COURT OF APPEALS
DECISION
DATED AND FILED

July 27, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2800

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

UNIVERSITY OF WISCONSIN HOSPITALS AND CLINICS AUTHORITY,

PETITIONER-APPELLANT,

V.

WISCONSIN EMPLOYMENT RELATIONS COMMITTEE,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: MICHAEL T. NOWAKOWSKI, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Deininger, JJ.

¶1 PER CURIAM. The University of Wisconsin Hospital and Clinics Authority (the hospital) appeals from a circuit court order affirming a decision by the Wisconsin Employment Relations Commission (WERC) to permit the

accretion of per diem nurses into a collective bargaining unit represented by District 1199W/ United Professionals for Quality Healthcare, SEIU, AFL-CIO (the union). The hospital challenges WERC's interpretation of WIS. STAT. § 111.05(5)(a) (1997-98)[1] to require a single bargaining unit for all patient care employees without regard to the employees' respective duties and working conditions, and without affording employees not currently included in the unit the opportunity to vote on whether to remain unrepresented. We conclude, however, that WERC's interpretation of § 111.05(5)(a) was at least as reasonable as any alternative interpretation, and affirm.

BACKGROUND

¶2 In 1995, in conjunction with changing the hospital's status from a state department to a public authority, the legislature created WIS. STAT. § 111.05(5) to provide in relevant part:

> (a) Collective bargaining units for representation of the employes of the University of Wisconsin Hospitals and Clinics Authority shall include one unit for employes engaged in each of the following functions:
>
> 1. Fiscal and staff services.
>
> 2. Patient care.
>
> 3. Science.
>
> (b) Collective bargaining units for representation of the [hospital employees] who are engaged in a function not specified in par. (a) shall be determined [through a voting mechanism].… The commission shall not permit fragmentation of such collective bargaining units or creation of any such collective bargaining unit that is too small to provide adequate representation of employes.

[1] All references to the Wisconsin Statutes in this opinion are to the 1997-98 version.

See 1995 Wis. Act 27, § 3782m. At the time this legislation was adopted, the union represented all of the full-time registered nurses and therapists who were employed by the hospital as patient care providers. In 1997, the union filed a clarification petition with WERC seeking a determination that approximately 135 per diem nurses should be added by the process of accretion to the patient care collective bargaining unit represented by the union.[2]

¶3 WERC first determined that, despite their casual or temporary status,[3] the per diem nurses were "employes" within the meaning of WIS. STAT. §§ 111.02(6)(a) and 111.05(5), and thus entitled to be represented through collective bargaining. It further determined that the per diem nurses were engaged in providing "patient care" within the meaning of § 111.05(5)(a)2. WERC then concluded that § 111.05(5)(a) requires all patient care employees to be included in a single collective bargaining unit, and ordered that the per diem nurses be added to the existing patient care bargaining unit by accretion.

¶4 The hospital sought review of WERC's decision in the circuit court pursuant to Chapter 227. The circuit court affirmed WERC's decision in its entirety, and the hospital appeals.

[2] The hospital also asks us to note the potential effect of the union's subsequently filed petition seeking to add more than 335 other employees, including nurse practitioners, pharmacists, social workers, exercise physiologists and chaplains to the union. We decline to do so, leaving open any majority status questions which that petition may raise.

[3] Per diem nurses are short-term employees who are hired to cover staff absences or fluctuations in patient needs.

STANDARD OF REVIEW

¶5 We review the administrative agency's decision rather than that of the circuit court. *See* ***Stafford Trucking, Inc. v. DILHR***, 102 Wis. 2d 256, 260, 306 N.W.2d 79 (Ct. App. 1981). We cannot substitute our judgment for that of the agency as to the weight or credibility of the evidence, and must uphold its factual findings if there is any credible and substantial evidence in the record upon which reasonable persons could rely to make those findings. *See* WIS. STAT. § 227.57(6); ***Princess House, Inc. v. DILHR***, 111 Wis. 2d 46, 54-55, 330 N.W.2d 169 (1983); ***Advance Die Casting Co. v. LIRC***, 154 Wis. 2d 239, 249, 453 N.W.2d 487 (Ct. App. 1989).

¶6 We are not bound by the agency's conclusions of law in the same manner as we are by its factual findings. *See* ***West Bend Educ. Ass'n v. WERC***, 121 Wis. 2d 1, 11, 357 N.W.2d 534 (1984). However, we may nonetheless defer to its determination. *See* ***id.*** at 11-12. An agency's interpretation or application of a statute may be accorded great weight deference, due weight deference or de novo review, depending on the circumstances. *See* ***UFE, Inc. v. LIRC***, 201 Wis. 2d 274, 284, 548 N.W.2d 57 (1996). Balancing the general experience WERC has in dealing with collective bargaining units with the fact that the proper construction of WIS. STAT. § 111.05(5)(a) appears to be an issue of first impression, we conclude that due weight deference is appropriate here. *See* ***Browne v. WERC***, 169 Wis. 2d 79, 100, 485 N.W.2d 376 (1992). Therefore, we will defer to WERC's interpretation so long as it is at least as reasonable as any alternate interpretation. *See* ***UFE*** at 286-87.

ANALYSIS

¶7 Although apparently dissatisfied with some of WERC's factual findings, the hospital does not challenge on appeal the determinations that the per diem nurses are employees and are engaged in patient care. The first question we are asked to decide is whether the legislative directive in WIS. STAT. § 111.05(5)(a) that the hospital's collective bargaining units "shall include one unit for employes engaged in … [p]atient care" means that there shall be *at least* one unit for patient care employees or that there shall be *only* one unit for such employees.

¶8 We are satisfied that WERC's construction of the term "one unit" to mean "only one unit" was the most reasonable interpretation available. As the trial court noted, the use of the number one plainly implies a restriction on the number of units. *See* ***Truttschel v. Martin***, 208 Wis. 2d 361, 365, 560 N.W.2d 315 (Ct. App. 1997) (When the language of a statute is plain, no further inquiry is warranted.). WERC's interpretation is further reinforced by the provision in subsection (5)(b) limiting the creation of additional collective bargaining units to those not engaged in the function of patient care. We therefore conclude, as did WERC, that the per diem nurses would be precluded from forming their own separate collective bargaining unit.

¶9 The hospital next contends that, even if WIS. STAT. § 111.05(5) prohibits the per diem nurses from creating their own separate collective bargaining unit, it does not follow that they must be included in the existing patient care unit. The hospital offers several arguments in support of its contention that the per diem nurses could choose to remain unrepresented.

¶10 First, the hospital claims that requiring all patient care employees to be included in the collective bargaining unit would violate their right to choice under WIS. STAT. § 111.04. That section provides:

> **Rights of employes.** Employes shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection; *and such employes shall also have the right to refrain from any or all of such activities*.

(Emphasis added.) The parties do not identify any appellate cases discussing this section, and we are not aware of any. However, in ***Berns v. WERC***, 99 Wis. 2d 252, 254, 299 N.W.2d 248 (1980), the Wisconsin Supreme Court concluded that the retroactive application of a fair-share agreement requiring non-union bargaining unit employees to pay union dues did not violate a similar statutory provision allowing municipal employees to refrain from organized labor activities.[4] While ***Berns*** is not directly on point, it is useful here to the extent it clarifies that inclusion in a collective bargaining unit is not synonymous with membership in a union or other labor organization. *See also* WIS. STAT. § 111.02(1) (defining a requirement that all employees within a collective bargaining unit be members of a single labor organization as an "all-union agreement"); ***Browne***, 169 Wis. 2d at 93 (discussing what activities could

[4] The statute at issue in ***Berns***, WIS. STAT. § 111.70(2), provides that municipal employees "shall have the right to refrain from [activities such as self-organization, forming joining or assisting labor organizations, and collective bargaining] *except that employes may be required to pay dues in the manner provided in a fair-share agreement.*" (Emphasis added.) Although WIS. STAT. § 111.04 makes no reference to fair-share agreements, separate provisions for such agreements for hospital employees are set forth in WIS. STAT. § 111.075.

appropriately be charged under a fair-share agreement to "nonunion employees in the bargaining units represented by the unions").

¶11 In other words, the determination that a certain group of employees will be included in a single collective bargaining unit does not mean that those employees have been forced to join a labor association, or to otherwise engage in collective bargaining activities. The unit determination merely identifies the characteristics of those employees who are to be represented together and assesses whether individual employees or groups of employees fall within the unit description. We therefore see no conflict between WIS. STAT. §§ 111.04 and 111.05(5).[5]

¶12 The hospital correctly points out that the usual standard for making unit determinations is whether various employees or groups of employees share a "community of interest" with one another, taking into account their respective duties, wages, hours, and other conditions of employment, so as to make common representation appropriate. *See, e.g.*, ***Arrowhead United Teachers Org. v. WERC***, 116 Wis. 2d 580, 595, 342 N.W.2d 709 (1984). We conclude, however, that it was reasonable for WERC to decide that the community-of-interest test was inapplicable to unit determinations made under WIS. STAT. § 111.05(5). By specifying that there will be one collective bargaining unit for hospital employees engaged in patient care, the legislature has already determined that it would be appropriate for all employees so engaged to share representation. It has, in effect, substituted a functionality test for the community-of-interest test which applies in

[5] We do not address whether a fair-share agreement under WIS. STAT. § 111.075 would conflict with the right to refrain from participation in labor activities under WIS. STAT. § 111.04 because that issue is not squarely before us.

other unit determination contexts. Therefore, the fact that the working conditions of the per diem nurses may substantially differ from those of other hospital employees also engaged in the function of patient care is irrelevant to the question whether they should be included in the same collective bargaining unit for purposes of representation.

¶13 Finally, the hospital asserts that the per diem nurses should not be accreted into the patient care bargaining unit because they have not been afforded an election on whether to remain unrepresented. However, we see nothing in the statues or case law which would compel such an election.

¶14 WISCONSIN STAT. § 111.05(5)(b) requires election procedures for unit determination to be used for hospital employees "who are engaged in a function not specified in par. (a)." This implies that such election procedures are, if not completely unavailable, at least not statutorily required for hospital employees who are engaged in the functions specified in paragraph (a), including patient care.

¶15 The hospital cites ***Consolidated Papers, Inc. v. NLRB***, 670 F.2d 754, 756-57 (7th Cir. 1982), for the proposition that accretion is only available to add "a relatively small group of employees" with "no separate identity" into an existing bargaining unit, and claims that the group of 135 per diem nurses is too large and too distinct a group to qualify. It also points to several prior WERC decisions to show that accretion is typically limited to situations in which new positions are created, and that accretion elections may be ordered when a large number of employees are involved. *See* ***Adams County (Highway Department)***, WERC Dec. No. 27093 (November 1991); ***City of Watertown***, WERC Dec. No. 24798 (August 1987); ***City of Clintonville***, WERC Dec. No. 19858 (August

1982); ***Walworth County Handicapped Children's Educ. Bd.***, WERC Dec. No. 17129 (July 1979).

¶16 The problem with the examples cited by the hospital is that, in each instance, the body making the accretion determination was also called upon to decide how closely the interests of the proposed unit members corresponded to those of the existing members under the community-of-interests test. As we have already discussed, here the question of whether the proposed unit members were engaged in patient care is dispositive of whether they fall within the unit definition. Thus, unlike the employees in ***Consolidated Papers***, the per diem nurses cannot claim that their interests are too distinct to warrant joint representation.

¶17 In sum, while we acknowledge that employee choice is generally an important interest to be considered in unit determination and accretion decisions, the legislature has already struck the balance here in favor of anti-fragmentation. We therefore conclude that WERC's determination that no election was required prior to accretion was at least as reasonable as the hospital's position. Accordingly, we defer to WERC's decision to accrete the per diem nurses into the existing patient care bargaining unit and affirm the circuit court.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.